



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr C Drimtzi

v

Paat White Cloud Limited

Heard at: London Central

On: 15-17 December 2020

Before: Employment Judge Glennie

Representation:

Claimant: Mr A Bachu (Counsel)

Respondent: Ms I Egan (Counsel)

JUDGMENT

1. **The complaint of unfair constructive dismissal is dismissed.**
2. **The complaint of unlawful deduction from wages and/or breach of contract is well-founded in respect of the periods 18-24 March 2019 (sickness absence) and 25 March-15 April 2019 (holiday pay), but not in respect of the period 16 April-7 May 2019. The issue of remedy for this complaint remains to be determined by the Tribunal if not agreed by the parties.**

REASONS

1. The Claimant, Mr Drimtzi, makes complaints of unfair dismissal and unlawful deduction from wages and/or breach of contract. The Respondent, Paat White Cloud Limited, resists those complaints.
2. The hearing took place via video (CVP). I was located in the Tribunal's offices at Victory House, while all other participants attended remotely. The Claimant was assisted by a Greek translator, Mr Konstantineas.
3. I had intended to give an oral judgment on liability on what would have been an additional (fourth) day of the hearing, 20 December. That proved impossible, as Victory House was unexpectedly closed and all hearings for

that week cancelled. I was subsequently able to retrieve the papers so as to be able to write a reserved judgment and reasons.

The issues

4. The issues in the case were defined by Employment Judge E Burns at a preliminary hearing on 30 March 2020 in the following terms.

Constructive unfair dismissal

4.1 Did the Respondent without reasonable and proper cause, by its conduct fundamentally breach the implied term of mutual confidence and trust? The conduct relied on is:

- (a) The Respondent's alleged failure to pay the Claimant sick pay between 18 and 24 March 2019.
- (b) The Respondent's alleged failure to pay the Claimant holiday pay between 25 March and 15 April 2019.
- (c) The Respondent's alleged unlawful suspension of the Claimant, without pay.
- (d) The Respondent's instigation of an allegedly unwarranted disciplinary process against the Claimant.
- (e) The Respondent's alleged failure to deal with the Claimant's grievance.

4.2 Was that conduct an effective cause of the Claimant's resignation on 7 May 2019?

Unlawful deductions / breach of contract

4.3 Is the Claimant due to be paid for the following periods:

- (a) Sick pay from 18 to 24 March 2019.
- (b) Holiday pay from 25 March to 15 April 2019.
- (c) Pay from 16 April to 7 May 2019.

Evidence and findings of fact

5. I heard evidence from the following witnesses:

5.1 The Claimant.

5.2 Mr Panagiotis Grafakos, a director of the Respondent.

- 5.3 Mr Gasparis Zampelis, a director and latterly General Manager of the Respondent.
6. There was an agreed bundle of documents, and page numbers that follow refer to that bundle. Many of the emails between the parties were written in Greek, which is the first language of all those who gave evidence. There were agreed translations of the relevant documents: these had not been professionally prepared, but I was able to understand the necessary elements.
 7. The Respondent company was established in 2016 and operates a cake shop in Covent Garden which, at the time of the events with which the case is concerned, was known as Sweetheart Cake and Bake. The Claimant and his wife had also owned and run shops with the same name in Greece. They moved to London in 2016 in order to take over the running of the shop, with the Claimant being shop manager and his wife in charge of baking.
 8. The shareholding in the Respondent is 51% held by Aqua Vista Hotels Limited and 49% held by Sweetheart HB Limited (owned by the Claimant's family). Part of the background to the case is that there has been a long-running dispute between the shareholders in the Respondent. I have had little evidence about this. The Claimant says that the directors of Aqua Vista Hotels Limited are trying to take over the business, while the Respondents say that there were problems with the way in which the shop was being run which meant that, although revenue was increasing, profits were not. They said that this meant that, while the Claimant and wife were drawing salaries, the other shareholders were seeing no return on their investment. The Claimant was paid at the rate of £10 per hour and was drawing around £2,500 per month, indicating a working week of approaching 60 hours.
 9. Having set out this background, I turn to the evidence about the matters in issue.
 10. There was at page 86 of the bundle a document dated 7 January 2019 addressed to the Respondent company, signed by the Claimant and by his son, the latter under the words "Director's confirmation and signature." The document read in part as follows:

"Dear Sirs,

"I am writing this letter to inform you about my annual leave of 3 (three) weeks which I can avail as per the company policy. I would like to take my annual leave starting from 25/03/2019 to 15/04/2019.

"The main reason for my leave are health driven as I suffer from chronic back pain and spine pain and I will need to go through a series of prescheduled treatments."

11. In paragraph 16 of his witness statement the Claimant said that the purpose of his leave was “to be present for several family matters”. When asked in cross-examination about the difference between this and the 7 January document, he said that both reasons were applicable. He also stated that the reason why he wrote the 7 January document was that he had been greatly concerned by what had been said in November or December 2018, and which had caused him to feel that he needed a “safety net”. By this, I understood the Claimant to mean that he believed he might need some proof that he had booked this leave. He said that he retained the document and did not send it to anyone else at the time.
12. On 5 March 2019 a shareholders’ meeting, attended by the Claimant among others, decided by a majority to engage Mr Zampelis as General Manager. In paragraph 7 of his witness statement, Mr Grafakos said that Mr Zampelis’ role would be to oversee the Claimant and take over the financial operations. He also stated that the Claimant was aware that he would remain in control of the day to day operations in the shop. The Claimant’s view, as expressed in paragraph 12 of his witness statement, was that he was being replaced as shop manager. Ultimately, I did not find these accounts to be seriously inconsistent with each other: they seemed to me to describe the same situation, as seen from different perspectives.
13. A further resolution was passed at the same meeting restricting all employees to a maximum of 48 hours per week. The Claimant said that this had the effect of dramatically reducing his income.
14. On 14 March 2019 Mr Grafakos attended the shop with Mr Zampelis, with a view to introducing him to the staff. The Claimant’s evidence about this occasion was that Mr Zampelis introduced himself as “the new manager for all aspects of the shop” and as “the manager of everything”. He commented in his oral evidence that “the only relevance of Mr Zampelis to my claim is the pressure I received from him, which led me to resign”. In paragraph 14 of his statement, the Claimant described Mr Zampelis’s attitude towards him and the rest of the staff as “degrading and hostile” and he said that three trusted employees resigned because of his attitude over 2 days in March 2019.
15. Mr Grafakos said that on this occasion the Claimant was very disgruntled and obstructive. Mr Zampelis also described the Claimant as obstructive, and said that he would interrupt whenever another member of staff was asked a question.
16. I find that the Claimant was resistant to the introduction of Mr Zampelis, and that he showed this in a way which could be interpreted as being obstructive. It is clear that the Claimant disliked the idea of Mr Zampelis becoming general manager, and saw this in terms of his taking over the shop and the Claimant’s duties as manager. I find it unsurprising that the Claimant would dislike this development, as it meant that he was losing at least some degree of control of the shop and, with the restriction on working hours, was also losing money.

17. On 18 March 2019 the Claimant developed severe back pain. He sent an email to Mr Zampelis at page 87 stating that he had spent the whole night with back and leg pains, that he had to visit the doctor, and that he would not be able to attend the store that morning. The Claimant also produced at page 88 an A&E record from the Royal London Hospital recording sciatica with back and leg pain and at pages 89-90 a self-certificate dated 22 March 2019. Mr Zampelis's evidence, which I accept in the light of what the Claimant said about these documents, was that he saw neither of them at the time. The Claimant's account was that he sent these to the accountant: this was supported by an email that he produced in the course of the hearing in which he wrote: "I left the hospital a while ago and my doctor found a problem in my waist. I will not be able to be in the store for the next 7 days. I will send the papers to the accounting office."
18. Mr Zampelis also stated that he was not aware at the time that an employee did not need a doctor's certificate for an absence of up to 7 days, although he had become aware of this subsequently, and so he now accepted that the Claimant was entitled to sick pay for the duration of this absence. (He has not so far been paid for this period). I also accepted Mr Zampelis's evidence on this point. At the time he had recently arrived in the UK, and I found it plausible that he might believe that a doctor's certificate was required in all cases of sickness absence, and that he might be unaware of the system of self-certification.
19. Paragraph 15 of Mr Zampelis's witness statement refers to the Claimant coming to the shop on 23 March and briefly discussing the departure of the pastry chef and other matters, but this seems to be an error as to the date. At 02.01 on 25 March Mr Zampelis sent an email to the Claimant at page 96 referring to a conversation in the store "today" and asking for a meeting "tomorrow (25/03/19) around noon". It seemed to me that the sensible interpretation of this was that there had been a conversation in the course of 24 March, which Mr Zampelis was describing as "today" although he was writing after midnight, and that he would therefore describe 25 March as "tomorrow". The email recorded that the last remaining chef would be leaving on 29 March, and so a replacement would be required, and that Mr Zampelis had compiled a list of concerns that he wished to discuss. Mr Zampelis continued that the Claimant attended the store briefly on 25 March, but took the recipe book and left without speaking.
20. In paragraph 16 of his statement, the Claimant said that he had been intending to start his period of leave on 25 March, but his back pain was such that he could not travel to Greece. He sent an email to Mr Zampelis at pages 104 to 108 at 23.56 on 25 March in which he referred to their in-store discussion "today".
21. I find that it makes no real difference to the matters that I have to decide whether this conversation took place on 24, 25 or even 23 March. There was a single conversation between the Claimant and Mr Zampelis at the shop. The Claimant stated in his email of 25 March that he had informed

Mr Zampelis about the suppliers and quantities of products. He was also critical of Mr Zampelis's management style, saying that this was the cause of the staff members leaving. Mr Zampelis's account was that the discussion was brief and that the Claimant was unhelpful about the operational details that he requested. He commented in his oral evidence that the situation was difficult because the Claimant would write emails that indicated that he had been co-operative, when this had not been the case in reality.

22. The Claimant also wrote in his email (this is a translation) "I finally told you about my January license that starts today 25/3". By "license" the Claimant meant leave: whether he in fact told Mr Zampelis about this when they met, or the first mention of it was in the email, the relevant point is that it was only at this point that Mr Zampelis was made aware that the Claimant was taking leave from 25 March onwards.
23. Mr Zampelis said in paragraph 19 of his statement that he and Mr Grafakos carried out inspections of the shop on 25 and 29 March 2019. He said that they found deficiencies in the documentation and a number of items used for the preparation of food which were beyond their use by date, or where that date had been removed. Mr Grafakos' account in paragraph 12 of his statement was slightly different, in that he said that he would often visit the shop himself, and that Mr Zampelis kept him up to date with what was happening, such as the discovery of the out of date food. This difference was not put to either Mr Zampelis or Mr Grafakos, and it seems to me to be of little significance given what the Claimant said about this issue in his oral evidence.
24. Mr Zampelis referred to photographs at pages 60-84 which, he said, showed out of date food items that had been found in the shop. The Claimant had not said anything about these in his witness statement, or in any earlier correspondence. When cross-examined about them, he made several points, as follows:
 - 24.1 The label shown on page 60 simply read "03.19", which could have meant the end of March, such that the product was not out of date on 25 or 29 March.
 - 24.2 Many of the labels were hand written; he did not recognise the writing; they could have been written by anyone; he was not accusing Mr Zampelis, but someone could have written them in order to provide the basis for an accusation against him.
 - 24.3 Some of the products clearly were out of date according to the manufacturers' labels (for example, pages 65 and 70, which both had expiry dates in 2017). These were not used to make cakes to be sold, but were retained to make display or decorative cakes to put in the shop window, the argument being that it made economic sense to use up out of date ingredients for this purpose. The display cakes would not be sold or eaten.

- 24.4 Page 73 showed date-expired jars of jam, a product that was sold in the shop. The Claimant disputed the suggestion that these had been found on display, saying that these too were retained for use in display cakes.
25. As to the second point above, I am bound to observe that there were some peculiarities in some of the handwritten labels. For example, page 61 showed what was said to be a tub of bicarbonate of soda with a manufacturer's best before date of 18/12/19. A separate handwritten label recorded "baking soda" with a use by date of 10.03.19. On page 64 a handwritten label specifying "choc shaving" carried the unlikely use by date of 30 February 2018.
26. That said, it seemed to me that the most telling point made by the Claimant was the third of those listed above. His explanation about the display cakes involved accepting that there were at least some out of date products to be found in the shop. He did not give this explanation in respect of one or two examples only: he gave it in relation to the items on pages 65, 67, 69, 70, 71, 72, 73 and 75. Whatever may have been the origin of the handwritten labels, there were quantities of out of date ingredients in the shop.
27. The Claimant did not return to work after 25 March 2019, his case being that he was on leave. The dispute between the shareholders continued, and there was correspondence between solicitors instructed by the Respondent and Aqua Vista Hotels Limited, and Sweetheart HB Limited, respectively. On 9 April 2019 solicitors for the former two companies sent a letter to those acting for the latter. The copy at pages 109-110 of the bundle was extensively redacted, but included the following:
- "While writing, we are aware that Mr Charalampous Drimtzias and his wife are both on annual leave at present. It is accepted that both are employees of PAAT White Cloud Limited but we do not believe it would be conducive for such individuals to return to work at present given the breakdown in the relationship between your client and Aqua Vista Hotels Limited. This similarly applies to their son who we understand was recently added to the payroll of PAAT White Cloud Limited. Please confirm by 4pm tomorrow (10 April 2019) that until this matter is resolved these individuals will not attend the premises of PAAT White Cloud Limited and agree to have their employment suspended until such time as an agreement can be reached between Aqua Vista Hotels Limited and your client. Please note that if should [sic] any of these individuals refuse to such a suspension our client will most likely have to instigate disciplinary action which is only likely to cause additional conflict between the parties and hinder any possible settlement."
28. On 15 April 2019 in another heavily redacted letter at pages 186-188, the solicitors for Sweetheart HB Limited responded as follows:

“With regards to the employment suspension of Sweetheart’s representatives and the dismissal and unprofessional treatment of the business’s trusted employees, we are instructed to advise you that you have exposed the company to possible claims for unfair dismissal. Our client would suggest these individuals be suspended on full pay until such time as our respective clients come to an amicable agreement.”

29. On the same date, 15 April, the Claimant sent an email at page 111 to Mr Grafakos, Mr Zampelis and others, in which he wrote:

“I was surprised that my payroll, including my sick pay and my holiday pay, has not yet been settled. If this matter is not resolved by 5.00 pm on April 17, you leave me no choice but to proceed legally on the matter. Also be aware that I am pursuing my rights for a normal payroll compensation throughout my suspension period which was initiated by your board of directors and stated on your letter of April 9th 2019.”

30. On 21 April 2019 Mr Zampelis sent out staff rotas for the week commencing 22 April, which showed the Claimant and his wife due to work on 24-28 April inclusive. The Claimant sent an email to Mr Zampelis on 23 April 2019 at page 111 in the following terms:

“Your letter received by the lawyers of PAAT White Cloud, on April 9, made it clear that my employment position is suspended, without giving me any prior notice or a specific time frame for my suspension. I am at a loss to understand why you have therefore sent a work rota to us with our details on the rota.

“I am going to be in Greece with my family considering our position and speaking with specialist UK employment lawyers. I feel that our basic employment law rights have been breached by this suspension and other treatment of us.

“Whilst I do this I am reserving my position in all respects and I will be reverting to you within a reasonable time period.”

31. The evidence of Mr Grafakos and Mr Zampelis was that they discussed the out of date stock that had been discovered and decided that the Claimant and his wife should be the subject of a disciplinary process. A letter was sent to the Claimant on 24 April 2019 at page 114 asking him to attend a disciplinary meeting on 29 April. (It was common ground that the Claimant’s wife was also sent a similar invitation, although this played no part in the evidence that I heard). The letter to the Claimant cited two allegations, namely selling food items beyond their use by date and failing to keep the premises sufficiently clean; and being absent from work without authorisation.

32. The Claimant replied to this on 27 April 2019 at page 112. In answer to the allegation about out of date items, he said that he and his wife had always maintained the highest standards and that as neither had been at work for

over a month, any issue with cleanliness or use by dates was the responsibility of Mr Zampelis. In relation to his absence, the Claimant said that he and his wife had had no choice but to accept being suspended, and that their pay had then been stopped. He continued that he had informed Mr Zampelis that they would be going to Greece, and that they had then been sent a rota requiring their attendance at work.

33. The Claimant asserted that there was a concerted effort to remove him and his wife from the business without any lawful basis and that the disciplinary letter contained entirely disingenuous allegations. He stated that the invitation amounted to another unlawful breach of contract, and that he wanted his complaints about that, his suspension, and the non-payment of sick pay and holiday pay to be dealt with as a formal grievance. The Claimant concluded that he wished for the disciplinary hearing to be postponed pending resolution of his grievance.
34. Mr Zampelis wrote again to the Claimant on 3 May 2019 at pages 116-117. He noted that the Claimant had not attended the disciplinary hearing on 29 April and stated that the hearing would be re-listed on 7 May. Mr Zampelis stated that the Claimant was not suspended from work, that he was expected back at least by 25 March, and that he was therefore absent without authority. He said that the Claimant's sickness absence was noted, but the booking of leave was disputed, and that the Claimant should send the original document making the booking (i.e. the document that was signed by the Claimant's son). Mr Zampelis said that the grievance could be dealt with concurrently with the disciplinary matter: in his witness statement he confirmed that he indeed meant that they could be dealt with together.
35. On 7 May 2019 Mr Zampelis wrote to the Claimant at pages 118-119. The third paragraph of this letter was somewhat confusing, as it stated that "we do not accept that your grievance overlaps with the disciplinary process, therefore, we are well with our rights at your employer to carry on as we see fit". Later, however, the letter stated "...we have set out a timetable to hear the grievance and disciplinary matters together, given they feature the same issues." The letter continued that the disciplinary and grievance hearing would be heard on 8 May at 9 am.
36. The following paragraphs appeared towards the end of the letter:

"For clarity, we repeat, you are not currently suspended from work, you were expected back at the very least on 25 March, therefore you are absent without authority and no payment of salary will be made to you as you have failed to turn up to work and undertake your normal duties. You are expected to work as normal; you were not given formal notice of suspension.

"We note that you were booked sick from 18 March 2019 to 24 March 2019 and you say you had annual leave booked from 25 March to 15 April 2019. The booking of leave is currently disputed by us, as you know we require

the original document to check the voracity [sic] of the document, we need confirmation of how it was sent, if by email a copy of the email. The letter was produced on a computer, so we require the original to be emailed to us, once we have had this from you, we will be better placed to confirm if the request and authorisation was legitimate.”

37. Mr Zampelis’ evidence was that he did not want to dismiss the Claimant: he said that he hoped to resolve the situation without reaching that point, as he needed to find a solution for the business. I accept that, had a resolution falling short of dismissal been available that was satisfactory to Mr Zampelis, he would have taken that route: I am not, however, convinced that in the circumstances it was likely that a satisfactory outcome involving the Claimant staying in the business could have been reached.
38. In the event, the Claimant replied to Mr Zampelis on 7 May 2019 at page 124, resigning from his employment. The letter read as follows:

“I refer to your email of earlier today. You insist on proceeding with a disciplinary hearing that, as alleged in my letter of 27 April, I consider to be unlawful and in breach of my contract. My letter asserts that the disciplinary allegations are entirely contrived and presented in direct response to my complaints of unlawful suspension and other breaches of contract. I asked that these complaints be treated as a formal grievance.

“You initially ignored my grievance and now state that you will hear it personally at the same time as the disciplinary hearing. The grievance relates in large part to actions committed by you and to the legitimacy of the disciplinary hearing itself. The fact that you will be the one to hear my grievance makes a mockery of the process and shows it for what it is – a means to achieving a predetermined end.

“I repeat that I will not be attending the hearing tomorrow. Your actions have left me with no choice but to resign my employment with immediate effect and pursue my complaints externally, through the court / tribunal system.”

39. There followed correspondence between solicitors acting for the Respondents and Aqua Vista Hotels Limited on the one side, and the Claimant and his wife on the other. Some of this was without prejudice, and I have not seen it. In an open letter of 15 May 2019 at page 125 the solicitors acting for the Claimant and his wife asserted that there had been a concerted campaign to remove them from the business. Under the heading “Appointment of a New Shop Manager” the letter continued as follows:

“On 13 March 2019, the decision was made by AVH to appoint Gasparis Zampelis as shop manager and director of the Company. This decision, which was taken unilaterally and without consultation with our clients, removed responsibility for management of the shop from Mr Drimtzias. The

appointment of a new manager amounts to a fundamental breach of Mr Drimtzias's employment contract."

40. The letter also asserted that the non-payment of sick pay and holiday pay were breaches of statutory duties and breaches of contract. In relation to suspension, the letter stated that the solicitors' letter of 9 April 2019 left the Claimant and his wife with no choice but to treat themselves as suspended, and so their solicitors suggested suspension on full pay until agreement was reached. The letter then stated, "Your clients did not respond further and our clients acted accordingly, treating themselves as suspended from that date." The letter also asserted that the disciplinary action and refusal to engage with the grievances were breaches of contract, and that cumulatively these amounted to a repudiatory breach.

The applicable law and conclusions

41. I first considered the complaint of unfair constructive dismissal.
42. In **Malik v Bank of Credit and Commerce International [1988] AC 20** the implied term was formulated as "an obligation on the employer not, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."
43. The first matter relied on as a breach of contract (point (a) in paragraph 4.1 above) was the non-payment of sick pay for the period 18-24 March 2019. Mr Bachu submitted that, in respect of this and the non-payment of holiday pay for the period 25 March to 15 April the Respondent had made a calculated attempt to destroy the employment relationship.
44. The Respondents have now accepted that they are liable to pay the sick pay, conceding that the Claimant did not need a medical certificate for this period, and that it was incorrect to assert, as they did at the time, that this was required. Their case is that they genuinely believed that a certificate was required.
45. I have found that Mr Zampelis did not see the A&E record or the Claimant's self-certificate at the material time. I have also accepted that he was not aware that the Claimant did not need a medical certificate to cover the period concerned, and could self-certify.
46. In these circumstances, I find that it was not a breach of the implied term to fail to pay the Claimant's sick pay, in that the Respondent's actions were not calculated or likely to undermine trust and confidence. There was little communication on the point before the Claimant resigned. Mr Zampelis did not, for example, write to the Claimant saying that he needed to see a medical certificate in order to pay the sick pay; and the Claimant did not write saying that he had a self-certificate and an A&E discharge form, and that he could send copies to Mr Zampelis. This was not, in itself, a very significant matter when considered alongside the ongoing shareholders'

dispute and the tension over the role of Mr Zampelis: it could have been resolved easily with a degree of communication.

47. In the alternative, for the same reasons, I find that the Respondent had reasonable cause for acting in the way that it did, namely the (mistaken) belief that a medical certificate was required, coupled with the Claimant's failure to produce at least his self-certificate and an explanation that this was sufficient.
48. Point (b) relied on as a breach of contract was the failure to pay holiday pay. I found that there was no breach of contract in this respect, and that the Respondent's actions were not calculated or likely to undermine trust and confidence. It may have been that the Claimant had been able to authorise his own leave, but it is evident that in any event by 7 January 2019 he realised that he should give advance notice, at least in respect of a period of 3 weeks. The Claimant knew that Mr Zampelis had been appointed General Manager at the meeting on 5 March, and his own account was that Mr Zampelis had announced himself as "the manager of everything" when he came to the shop on 14 March. I have found that the Claimant resented Mr Zampelis' arrival, and that this was unsurprising: but I also find that he cannot realistically have thought that he could continue as if Mr Zampelis had not been appointed.
49. It may well be the case that, if the Claimant's leave had been properly authorised when he booked it (including authorised by himself), Mr Zampelis would not have been in a position to dispute it. As General Manager however he could, in my judgment, reasonably expect to be informed of it earlier than the day before the leave was due to start. I find that, Mr Zampelis being informed so late, and at a time when relations with the Claimant were poor, the Respondent could reasonably take the view that the Claimant appeared to be absent without authorisation, as stated in the disciplinary letter of 24 April 2019 at page 114.
50. I also find that the Respondent was entitled to treat the 7 January document with some suspicion. Although the situation may be explicable, it is somewhat strange that the Claimant "booked" his leave with his son and then kept the document to himself. One might ask, if he could authorise the leave himself, why not do so, and why involve his son? If he needed authorisation, or some form of proof that he had booked the leave, why did he keep the document to himself and why did he not inform Mr Zampelis of the leave, and that it had been authorised, sooner? The Claimant then compounded the situation by not producing the original document when asked to do so, leaving open the question why he would not or could not do so.
51. Again, I find all of these matters have to be considered in the context of the shareholders' dispute and the tension over the role of Mr Zampelis. The Claimant's actions in failing to inform Mr Zampelis of his leave until he was about to commence it, and his failure to produce the original of the 7

January document, were, in my judgement, likely to be seen as provocative.

52. For the same reasons, I also find that the Respondent had reasonable cause for its actions. There was reason to at least question how and when the leave had been arranged.
53. It follows that I do not accept the submission that the Respondent had made a calculated attempt to destroy the employment relationship in its dealings with the sick pay and leave issues.
54. The third matter relied on as a breach of contract, at point (c), concerns suspension. As formulated by EJ Burns, the issue refers to the Respondent's unlawful suspension of the Claimant. In his email of 15 April 2019 to Mr Zampelis, the Claimant stated that his suspension period had been initiated by the solicitors' letter of 9 April. I find that the latter did not suspend the Claimant: it asked for the agreement of the Claimant and his wife to being suspended. The Claimant's solicitors counter-proposed suspension on full pay, also on 15 April. Mr Zampelis sent the staff rotas on 21 April, and the Claimant again asserted that he was suspended in his emails of 23 and 27 April 2019. Mr Zampelis stated that the Claimant was not suspended.
55. The Respondent did not, in the course of these exchanges, state that the Claimant was or had been suspended. That came from the Claimant himself. It is true that the Respondent did not say that, contrary to what he was asserting, the Claimant had not been suspended, until 3 May 2019. That is not, in my judgement, the same as suspending him; and in any event, I accept Mr Zampelis' evidence that there was a great deal of correspondence at the time and he was initially uncertain about replying to it.
56. It might therefore be said that the Claimant has failed to make out this alleged breach of contract on the facts, in that he was not suspended. I have, however, considered the wider question of whether the Respondent's actions in relation to the question of suspension amounted to a breach of the implied term. I find that they did not. Solicitors on both "sides" were proposing suspension as a way of dealing with the situation. It seems to me reasonable that this should have been considered: there were clearly difficulties in the running of the shop and tension between Mr Zampelis on the one hand and the Claimant and his wife on the other. For the same reasons, I would also find that the Respondent had reasonable cause to canvass the prospect of suspension.
57. Point (d) relied on the instigation of the disciplinary process as a breach of the implied term. Mr Bachu submitted that it had not been necessary for the Respondent to go directly to a disciplinary process: in particular, they could have asked the Claimant for his comments about the out of date stock.

58. It clearly would have been possible for the Respondent to have carried out further investigation before instigating a disciplinary process. I do not, however, consider that starting the disciplinary process at this point amounted to a breach of the implied term. There undoubtedly were quantities of out of date stock in the store. The Claimant had left on leave with only around a day's notice to Mr Zampelis, had subsequently asserted that he had been suspended, and had stated that he was going to be in Greece. An informal investigation would not have been an obvious way forward in those circumstances. The Claimant would have had an opportunity to put forward his case in the disciplinary meeting, had he engaged with the process.
59. I therefore find that instigating the disciplinary process did not amount to a breach of contract. The Claimant has asserted that the allegations were disingenuous and unwarranted, but there clearly was a factual basis for them. It is possible to discern reasons why the Respondent might have wanted the Claimant to leave the business (e.g. his resentment of Mr Zampelis), or for that matter why they might have wanted him to remain (e.g. his experience in running the shop), but that is not the same as there being no basis for a disciplinary process. The same reasons lead me also to conclude that the Respondent had reasonable cause for commencing the disciplinary process.
60. The fifth and final point relied on, point (e), as a breach of contract was expressed by EJ Burns as failing to deal with the grievance. In the course of the hearing, I indicated that I would not hold the Claimant to the precise words used, but would consider his argument that the Respondent should have postponed the disciplinary process in order to consider the grievance, rather than proposing to deal with the two together.
61. Again, the approach that the Claimant advocates is something that the Respondent could have done. I find, however, that proposing to hear the disciplinary matter and the grievance together was an approach that could legitimately be taken. Two of the four matters raised in the grievance (the disciplinary process itself and non-payment of holiday pay) concerned matters already in issue in the disciplinary process. I do not consider that deciding to deal with the two matters together was calculated or likely to destroy or seriously damage trust and confidence. It was not what the Claimant wanted, but it was a legitimate approach for an employer to take in the circumstances. For the same reasons, I find that the Respondent had reasonable cause for dealing with the two together, i.e. that it would be convenient to do this and neither process would be prejudiced by their being considered together.
62. I have therefore found that, taken individually, none of the matters relied on amounted to a breach of contract. I have additionally considered whether, on looking at them as a whole, I should come to any different conclusion. I have concluded that I should not. There was clearly tension in the relationship between the parties, but I do not consider that the facts show an attempt to force the Claimant out of the business. If anything, the

Claimant seems to have been trying to make life difficult for the Respondent, particularly in his approach to his leave, and in maintaining that issues as to use by dates of products was the responsibility of Mr Zampelis, when (according to his evidence in the present hearing) there was in fact a different explanation, which he kept to himself.

63. These conclusions mean that the complaint of unfair constructive dismissal fails. However, in case I am wrong in finding that there was no breach of contract, there are two further issues that I should address.
64. The first is that of whether the matters complained of were an effective cause (they need not be the effective cause) of the Claimant's resignation. The Claimant's own evidence showed that his disapproval of Mr Zampelis was an important factor: as quoted above, he said that the pressure from Mr Zampelis led him to resign. In their letter of 15 May 2019, the Claimant's solicitors identified the appointment of Mr Zampelis as a fundamental breach of contract. It is also impossible to ignore the ongoing shareholders' dispute. Ultimately, however, I would not find that these considerations mean that any of the acts complained of was not an effective cause of the Claimant's resignation. They were part of a bigger picture which included the shareholders' dispute and the appointment of Mr Zampelis.
65. There is also the issue as to whether the Claimant affirmed the contract following any breach that may have occurred. Ms Egan submitted that, essentially by virtue of the passage of time, the Claimant had affirmed the contract following any breach arising from the non-payment of sick pay or holiday pay.
66. The Claimant self-certified himself as sick from 18 to 24 March. He was then, on his case, on leave from 25 March until 15 April. He resigned on 7 May. Meanwhile, on 15 April the Claimant had asserted that he was entitled to sick pay and holiday pay. He repeated his complaints about these in his letter of 27 April. In the circumstances, I find it would be unrealistic to say that the Claimant had affirmed the contract or waived any breaches that arose from these matters. Had the issue arisen for determination, I would have found that he did not affirm the contract with respect to these matters.
67. There remain the complaints of unlawful deduction from wages / breach of contract. It was not suggested to me that any different principles apply under the two jurisdictions.
68. The Respondent concedes that the Claimant is entitled to be paid sick pay for the period of sickness absence. That element of the complaint of unlawful deduction from wages is therefore well-founded.
69. With regard to the dispute about the holiday pay, I find that the Claimant was able to authorise his own leave at the time that he did so in January 2019. I have explained why I have found that it was not a breach of

contract on the Respondent's part to decline to accept the leave without further evidence; but that is a different point. I find that the complaint of unlawful deduction from wages is also well-founded in respect of the holiday pay.

70. There is also the issue as to pay for the remaining period of the Claimant's employment from 16 April to 7 May. This point was not specifically addressed in submissions, and I omitted to ask whether this meant that there was an agreement on this point. In case there is not, my findings are as follows (and they can be ignored if agreement has in fact been reached). During this time the Claimant was not on leave, nor, as I have found, was he suspended. It follows that this was a period of unauthorised absence, for which no payment is due. This part of the complaint of unlawful deduction from wages fails.
71. There remains the question of remedy for the successful parts of the unlawful deduction complaint. I hope that the parties will be able to agree on this: if they cannot, they should jointly apply to the Tribunal with their proposals as to how this should be resolved.

Employment Judge Glennie

Employment Judge Glennie

Dated.....29 January 2021.....

Judgment sent to the parties on:

29/1/21.

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For the Tribunal Office